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OGC REVIEW COMPLETED

14 February 1949

SFD

General Counsel

Concurrent Employment in Civilian and Active Military Status

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25X1A 1. Reference is made to the attached cable from [] inquiring whether [] may pay Army enlisted personnel for specific work by the job performed in off hours. Army Regulations 35-1320, 1 d. (1) and AR 35-2340, dated 3 June 1947, are restatements of the statutes on dual compensation. Read literally, these statutes do not specifically forbid the contemplated use of Army enlisted personnel. One basic theme, however, characterized all of the decisions on this subject. Simply stated, the decisions hold that the peculiar status of the soldier limits his pay and emoluments to that of his grade and length of service as an enlisted man, and nothing more (18 Comp. Gen. 213).

2. In the cited decision the Comptroller held that the fact that, during hours of relaxation or relief from the actual performance of duties, the individual has time to devote to his personal affairs and that normally such time is available for the performance of other duties, is not the test. The test referred to is the compatibility of offices and it has been generally held that the holding of a civilian federal position while receiving active duty pay as a member of the armed forces is incompatible with military duty, actual or potential, and that it is immaterial that an individual may even be on furlough from the armed forces during the period concerned. (22 Comp. Gen. 127; 25 Comp. Gen. 866; 27 Comp. Gen. 510) Perhaps the most sweeping statement on this subject appears in 18 Comp. Gen. at page 216, where it is stated:

"Compatibility is determined by the individual's freedom to perform both services, the one without interference from the other. The superior-the controlling-obligation to render military service thus makes impossible the acceptance without qualification of another obligation to the Government to render service in a civilian capacity at the same time. The time of one in the military service is not his own, however limited the duties of the particular assignment may be, and any agreement or arrangement for the rendition of services to the Government in another position or employment is incompatible with his military duties actual or potential."

3. It is the opinion of this office that the above rulings are controlling in the circumstances set forth in the cable, and therefore, the suggested payments may not be authorized.

LAWRENCE R. HOUSTON